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In The

Supreme Court of the United States

October Term 1964

No. 900.

KELLER & GOETZ, INC.,

Petitioner,

—*vs.*—

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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—*vs.*—	
THE UNITED STATES OF AMERICA, *Respondent.*	

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on November 18, 1964.

Opinions Below

The opinion of Hon. Stephen W. Brennan, United States District Judge for the Northern District of New York (Record pp. 3a-4a) is not officially reported. The opinion of the United States Court of Appeals for the Second Circuit (infra p. 14) is reported at 337 F. 2d 858.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on November 18, 1964 and a copy thereof is appended to this petition at page 14, infra. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

Petitioner was the owner of certain property adjacent to Oswego Boulevard, a highway in the City of Syracuse, New York. Upon this property stood the coalyards and trestles which constituted the principal assets of its rapidly declining business.

The highway known as Oswego Boulevard has now become part of a limited access interstate highway known as Route 81. In the process, petitioners property was appropriated by the State of New York. It is the process by which such appropriation was accomplished and its effect upon the tax status of petitioner that give rise to this action.

Under the laws of the State of New York "title" to this property passed to the State upon filing of an "appropriation map" in the office of the Onondaga County Clerk on or about December 14, 1955. Petitioner was first officially advised of this "appropriation" by service of a copy of the map with notice on April 25, 1956.

Meanwhile, petitioner had filed a claim for compensation, upon which an award was made on October 7, 1957.

Not until the amount of this award was known was it possible to appraise the feasibility of relocating and rebuilding facilities for a declining business. Such an appraisal was made, a determination to liquidate followed

immediately, and a plan of liquidation was adopted on November 8, 1957.

Petitioner invoked the provisions of Section 337 of the Internal Revenue Code to assure a single tax at the stockholders' level on the gain resulting from the involuntary conversion of the corporate property.

The Internal Revenue Service assessed a second tax at the corporate level. This was paid and suit filed in the United States District Court to recover the same. The action was dismissed by the District Court and the dismissal affirmed by the United States Court of Appeals for the Second Circuit upon a technical and intricate interpretation of the word "sale" as used in Section 337, whereby it becomes impossible for the corporate owner of appropriated New York property to escape taxation of the gain at both the corporate and stockholders' levels.

The questions presented here, therefore, may be stated as follows:

Does the gain realized upon the appropriation of the taxpayer's real property (constituting its principal operating asset) qualify for non-recognition under Section 337 of the Internal Revenue Code of 1954?

Are not petitioner and its stockholders denied equal protection of the law as guaranteed by the Constitution of the United States by reason of being denied freedom from double taxation of a single gain by reason of an interpretation of Section 337 of the Internal Revenue Code which denies to residents of New York State a right available to similarly situated residents of other states?

Are not the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit in error in adopting an

interpretation of Section 337 of the Internal Revenue Code so narrow that it promotes inequality of taxation between similarly situated residents of different states?

Constitutional Provisions and Statutes Involved

The pertinent portions of Amendment V to the Constitution of the United States are set forth in the Appendix at Page 12.

The pertinent portions of Section 337 of the Internal Revenue Code of 1954 are set forth in the Appendix at Page 12.

The pertinent portions of Section 30 of the Highway Law of the State of New York are set forth in the Appendix at Page 12.

The pertinent portions of Section 25 of the Court of Claims Act of the State of New York are set forth in the Appendix at Page 13.

Statement

This action was commenced by petitioner in the United States District Court for the Northern District of New York to recover taxes and interest thereon paid to the United States Internal Revenue Service upon an additional assessment of income tax levied against petitioner for its fiscal year ending April 30, 1958. Jurisdiction was based upon the fact that the United States is the defendant (28 U. S. C. 1346).

Defendant moved for judgment on the pleadings and this motion was granted. Upon appeal to the United States Court of Appeals for the Second Circuit, this judgment was affirmed.

Petitioner is a corporation which operated a coal business in the City of Syracuse, New York for more than 35 years. Two families held all of its outstanding shares.

For several years, one stockholder, Herman W. Goetz, was the only member of either family active in the business. The business, as was common to the coal business in general, at this time, was in a decline. Its principal asset was the land upon which its coalyard and trestles stood.

On or about December 14, 1955, the State of New York filed an "appropriation map" describing this land. Under Section 30, subdivision 6, of the Highway Law of the State of New York, this filing vested title to the land in the State of New York even though the property owner had no notice of the filing. Notice was served on petitioner on April 25, 1956.

Petitioner duly filed its claim for compensation and an initial determination awarding damages in an amount of $242,000.00 was issued on October 7, 1957. This award was even then subject to an appeal period of 30 days and to a favorable title report from the State Attorney General.

Immediately upon learning the amount of the award, the stockholders undertook to discuss the feasibility of relocation and reconstruction of the necessary facilities for a declining business. A determination to liquidate was reached and a plan of liquidation was adopted on November 8, 1957.

All of the assets of the corporation were distributed within the one year period prescribed by Section 337 of the Internal Revenue Code, except for an escrow fund of $60,000.00 retained for use in the event that a deficiency was assessed.

A federal income tax return was duly filed on behalf of the corporation for this period. A deficiency in tax amounting to $49,803.12 was assessed and paid, together with interest in an amount of $8,438.56.

A claim for refund was thereafter duly filed. Upon disallowance thereof, this action was commenced.

Reasons For Granting the Writ

The decision of the Court of Appeals as well as of the District Court rest wholly upon a literal but illogical interpretation of the word "sale" as used in Section 337 of the Internal Revenue Code.

Unfortunately, the Court did not heed the words of its late great colleague, Hon. Learned Hand, who wrote, in *Central Hanover Bank and Trust Co.* v. *Commissioner of Internal Revenue*, 159 F. 2d 167, 169 (2d Cir.) Cert. den. 331 U. S. 836 (1947):

> "There is no more likely way to misapprehend the meaning of language — be it in a Constitution, a statute, a will or a contract than to read the words literally, forgetting the object which the document as a whole is meant to secure."

This whole situation could have been avoided by a simple judicial interpretation of the word "sale" to mean — not the bare statutory transfer of that nebulous legal concept known as "title" — but the real exchange of documents for cash — the transaction which in most instances also marks the transfer of title.

We fully realize the multitude of problems which this Court is asked to review and that not the least of this Court's problems is the choice of cases to be reviewed. We are aware too of the momentous problems which this Court has undertaken and resolved in recent months.

Yet, is it not possible that, pressed for time to hear, study and decide the important cases which it has, this Court has found it necessary to pass over the decision of many questions of substantial importance.

It is in this light that we ask this Court now that many of its most urgent tasks are, for the moment at least, completed, to review the instant case — not one that is of paramount importance to the nation but one which affects rights of equal importance to many individual citizens — including your petitioner herein and its stockholders — who have been taxed twice on the gain resulting from the involuntary sale of its principal operating asset.

The lower Courts, in their decisions on this subject, have, in effect, attributed to Congress an intent to discriminate, in the application of Section 337 of the Internal Revenue Code of 1954 between those corporations which voluntarily sell their property and those whose property is summarily taken, as was petitioner's.

They have, in fact, quite unnecessarily, created an anomalous situation wherein a corporation whose principal asset in New York is appropriated by the government, is treated wholly differently tax-wise from the corporation whose property in another state is similarly taken but by a different local procedure.

There is no difference in result. In place of the converted property, the corporation has money or a right to money. Where there was an operating asset, building and machinery, now there is only the right to an undetermined sum.

Yet, because New York's statute says title passed when the map was filed (even though the corporate owner had no notice of the filing) such a corporate owner — if it elects to dissolve — is subject to a dual tax, at the corporate as well as at the individual level, while its counterpart whose

property in another state is similarly taken but by a different procedure finds it possible to avoid the dual tax by dissolution under Section 337.

On this point, the Court of Appeals for the Second Circuit stated in *Wendell* v. *Comm. I. R.* 326 F. 2d 600 (1964) at p. 602:

> "The gist of petitioners' argument for reversal is that it is difficult for corporations whose property is condemned to take advantage of § 337 (a). There is some merit in their position, but we have not been made cognizant of any situations where a taxpayer who has property condemned cannot utilize the statute if he acts with sufficient celerity and acuity."

This alone is a distinction between the *Wendell* case and the case at bar. For the taxpayer whose property is taken merely by unilateral filing of a document by the taking authority cannot utilize the statute no matter how much celerity and acuity he may exercise.

The Court of Appeals, however, in affirming *Dwight* v. *United States* (328 Fed. 2d, 973, 974) rejected this distinction, stating, "This may appear a harsh result, but if it is to be corrected, Congress must act, the Courts have no power to do so."

The position of the petitioner in the instant action is well expressed by Judge Whitaker in his opinion in the Court of Claims of the United States (*Towanda Textiles, Inc.* v. *United States*, 180 F. Supp. 373, 376) wherein, after discussing the reports of the Congressional Committee on the purposes of Section 337, the Court states:

> "The taxation of the gain derived from an involuntary conversion of the property into cash during liquidation is clearly contrary to the declared purpose of Congress in enacting the section, which was to avoid double taxation incident to the liquidation of a corporation, by exempting the corporation from liability for gain derived from the disposition of its capital

> assets, irrespective of whether or not certain formalities had been observed. Literally, an involuntary conversion is not a sale but what Congress had in mind was a conversion of a corporation's capital assets into cash, whether voluntary or involuntary, and the distribution of the cash to the stockholders. It is not conceivable that Congress would have drawn a distinction between a gain from a voluntary conversion and an involuntary one, had the possibility of an involuntary conversion during liquidation come to its attention. The purpose was to exempt the corporation from liability for the tax and to collect the tax from the stockholders alone. This being true, we must hold, in order to carry out the clear purpose of Congress, that an involuntary conversion comes within the intent of Congress when it exempted the corporation from liability for a tax on the gain derived from a sale of its property in liquidation."

In the instant case, under the ruling in the *Dwight* case, this plaintiff would be completely denied the benefits of Section 337 of the Internal Revenue Code, wholly contrary to the Congressional intent — as set forth in *Towanda Textiles, Inc.*, supra. Until the appropriation map was filed plaintiff had no knowledge constructive or actual, that its property was to be taken. (Actual knowledge would normally follow only when the map with notice was served on the taxpayer corporation). If as these cases hold, the "sale" has taken place on the date the appropriation map is filed the corporate taxpayer has no opportunity whatsoever to effect liquidation under this supposedly remedial statute.

Even more recently, in *Henderson* v. *United States* (64-2 USTC ¶ 9799, USDC W. D. Wash., 1964), not yet officially reported), that Court held that capital gain did not accrue to the stockholders of a corporation liquidated under Section 337 until the year the money was received. In that case, the stockholders having adopted a plan of liquidation, prior to the taking of the property by the United States,

distributed to each in 1959 within the 12 month period, his proportionate share of the cash received from the United States as well as of the unliquidated claim.

Income taxes were paid in 1959 by the stockholders on the basis of the cash received, assigning a value of $1.00 to the unliquidated claim. This claim was settled in 1962 for an additional $900,000.00. Additional tax for 1959 was assessed on the ground that the entire sum received was income in the year of taking. The Court held otherwise, however, finding that "until they actually were settled and paid, the transactions remained open."

An analagous finding would certainly be in order in the present case, namely, that the "sale" of petitioner's property, for the purposes of Section 337, remained an open transaction until such time as the amount of the award had been finally determined so that the stockholders could intelligently appraise the advisability of liquidation.

In the *Henderson* case, it was possible for the determination to liquidate to predate the taking as it did, since the sole purpose of the corporations there involved was the operation of the property condemned.

In *Towne* v. *Eisner*, 245 U. S. 418, 425, Justice Oliver Wendell Holmes stated:

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and context according to the circumstances and the time in which it is used."

A "sale" involves many elements — including consideration, transfer of title, and of possession. In *Comm. of Internal Revenue* v. *Freihofer*, 102 F. 2d 787, 790 (3d Circ. 1939) the Court stated that to constitute a sale, "There must be parties standing to each other in the relation of buyer and seller, their minds must assent to the same proposition and a consideration must pass."

It is therefore not beyond the pale of this Court, to so interpret the word "sale" as used in this statute as to mean the last of the three basic elements thereof to occur, namely passing of title, consideration or possession. Thus the benefits of this statute would be available to every corporation alike.

This Court, and this Court alone, can now restore the interpretation of this statute to the logical, equitable sense, which would make its benefits available to every corporation alike.

For this reason as well as for those previously set forth, it is submitted that this Court should grant the writ of certiorari herein applied for, and review this case upon its merits.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statutes and Constitutional Provisions Involved

AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES (excerpt).

"No person shall be • • • deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Internal Revenue Code of 1954:

SEC. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) *General Rule.* — If —

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

Highway Law, 24 McKinney's Consolidated Laws of New York Annotated:

SEC. 30. ACQUISITION BY THE STATE OF PROPERTY REQUIRED FOR THE CONSTRUCTION OF THE STATE HIGHWAYS AND STRUCTURES THEREON.

• • •

3. The superintendent of public works shall cause to be prepared an accurate description and map of any and all property which he may deem necessary for purposes connected with the highway system of the State of New York or of any property in and to which he may deem the acquisition or exercise of an easement, interest or right to

be necessary for such purposes, indicating and describing in each case the particular easement, interest or right. On the approval of such description and map by the superintendent of public works, he may acquire such property, easements, interests or rights by appropriation as prescribed by this section.

* * *

5. On the filing of such description and map in the office of the department of state, the people of the State of New York, their officers and agents, may immediately enter upon and take possession of the property so described for any and all purposes connected with the highway system of the State of New York.

6. A copy of such description and map shall be filed by the superintendent of public works in the office of the county clerk or register of each county in which such property, or any portion thereof, is situated and thereupon the appropriation by the state of the property described in such description and map shall be deemed complete and the title to such property shall be vested in the people of the State of New York.

NEW YORK COURT OF CLAIMS ACT — 16 GILBERT & BLISS CIVIL PRACTICE OF NEW YORK — SEC. 25

An appeal must be taken within thirty days after the service of the order or judgment with notice of entry, or the service by the clerk of a certified copy of the order or judgment, by serving upon the claimant or his attorney, or upon the attorney-general and upon the clerk, in like manner as in the supreme court, a written notice to the effect that the appellant appeals from the order or from the judgment or from a special part thereof, and briefly stating the grounds of the appeal.

Appendix

Decision of the Court of Appeals for the Second Circuit.

PER CURIAM:

This is an appeal from a judgment dismissing the complaint in an action to recover federal income taxes allegedly illegally collected for the fiscal year ending April 30, 1958. Appellants' brief asks us to reconsider our decision in *Dwight* v. *U. S.*, 328 F. 2d 973, which is conceded to be directly in point. We see no reason to do so and affirm the judgment on that authority.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 900

KELLER & GOETZ, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Section 337(a) of the Internal Revenue Code of 1954 provides an exception from the rule that a corporation, like any other taxpayer, must recognize the gain or loss realized on the sale of property. Under this section, if "a corporation adopts a plan of complete liquidation" and "within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation * * *," then "no gain or loss

shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period."

The question in this case is whether the gain realized by petitioner from the condemnation of its property was excluded from income under Section 337 (a). The condemnation of property clearly constitutes a sale for the purposes of Section 337, *Hawaiian Gas Products* v. *Commissioner*, 126 F. 2d 4, 5 (C.A. 9), certiorari denied, 317 U.S. 653; *Wendell* v. *Commissioner*, 326 F. 2d 600, 602 (C.A. 2), and it is conceded that petitioner executed a plan of liquidation within 12 months of the adoption of the plan. The issue here is whether the sale by condemnation of petitioner's property took place *after* the adoption of the plan, so as to exempt the gain under Section 337 (a), or whether the condemnation sale took place *before* adoption of the plan, so as not to qualify for the exemption under Section 337(a).

Revenue Ruling 59-108, 1959-1 Cum. Bull. 72, 74, holds that the time at which a condemnation sale takes place is to be decided on an examination of the particular condemnation statute, and that—

> The obligation of the condemning authority should therefore be treated as fixed upon any such taking which transfers the title to the property and creates an immediate obligation upon the condemning authority to pay just compensation, even though the amount of the compensation remains to be determined and paid at a later date.

The New York statute applicable to this case (24 McKinney's Consolidated Laws of New York Annotated, Section 30) provides that "appropriation by the state * * * shall be deemed complete and the title to such property shall be vested in the people of the state of New York" when a description of the property and a map are filed by the superintendent of public works in the office of the county clerk or register where the property is located (Pet. App. 13). Since the map and description were filed in this case *before* the plan of liquidation was adopted, the condemnation sale did not come within Section 337(a). The Court of Appeals for the Second Circuit and the Tax Court have reached this conclusion in this and similar cases. *Wendell* v. *Commissioner*, 326 F. 2d 600 (C.A. 2); *Dwight* v. *United States*, 328 F. 2d 973 (C.A. 2); *Driscoll Bros. & Co.* v. *United States*, 221 F. Supp. 603 (N.D. N.Y.), appeal to the Second Circuit dismissed by taxpayer, April 21, 1964; *84 Woodbine Street Realty Corp.* v. *Commissioner*, decided by the Tax Court, September 26, 1963 (P-H Memo T.C., par. 63,262), appeal to the Second Circuit dismissed by the taxpayer, March 20, 1964. See also *Commissioner* v. *Kieselbach*, 127 F. 2d 359 (C.A. 3), affirmed as to another issue, 317 U.S. 399, where the court held that for the purposes of computing the holding period of a capital asset the owner ceased to hold it at the date of the order vesting title in the condemning authority.

There is no conflict. *Henderson* v. *United States* (W.D. Wash.), decided October 5, 1964 (64-2 U.S. T.C., par. 9799), and *Towanda Textiles, Inc.* v. *United*

States, 180 F. Supp. 373 (Ct. Cl.), cited by the petitioner, both related to involuntary conversions taking place within 12 months *after* the plans of liquidation were adopted.

The fact that under other (unspecified) statutes in New York or elsewhere the sale may occur at a later stage of the condemnation proceedings does not, contrary to petitioner's suggestion (Pet. 7), create a constitutional infirmity, nor are constitutional questions raised by the fact that other taxpayers differently situated may qualify for the Section 337(a) exception while petitioner may not. See *Phillips* v. *Commissioner*, 283 U.S. 589, 602; *Poe* v. *Seaborn*, 282 U.S. 101, 117-118.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH, 1965

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 767070 675